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IN THE

Supreme Court of the United States

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October Term, 1971
No. 71-822

FRANK K. KING,

Appellant,

vs.

CITY OF SAN BERNARDINO, etc., *et al.*,

Appellee.

On Appeal From the Court of Appeal, Fourth Appellate District, Division Two, of the State of California.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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Pursuant to Rule 16(3) of the Rules of this Court, Appellant files herewith his Brief in Opposition to the Motion to Dismiss received January 24, 1972, making the following contentions:

1. The Federal questions sought to be reviewed were timely and properly raised in the State Courts of California.

2. Judgment of the State Court herein can not reasonably be interpreted to rely on a non-federal basis.

Statement.

Initially, Appellant points out that potential constitutional issues were raised in this case as early as the pleading stage (Record No. 1—paragraph XIII, not XII.) Upon the filing of Respondent's Demurrer Appellant referred to the constitutional issues in his Points and Authorities in Opposition to Demurrer (Record

No. 4, p. 7, line 4) which was not referred to by Respondent in his Supplemental Points and Authorities in Support of Demurrer (Record No. 6) or his Second Supplemental Points and Authorities in Support of Demurrer (Record No. 8).

At the hearing on the Demurrer held before the Honorable Joseph T. Ciano, Department XI, San Bernardino Superior Court, Appellant specifically referred to Labor Code Section 555 and its application only to the City and County of San Francisco as being in violation of equal protection of the laws. Again said issue was ignored by Appellee in oral argument and the trial court sustained the Demurrer "upon all the grounds stated in the Demurrer" (Record No. 9) and Judgment of Dismissal followed (Record No. 10).

Appellant did continue to raise the constitutional questions in his Opening Brief on Appeal to the 4th District Court of Appeal (Record, No. 11, p. 5, paragraph 2 and p. 10, paragraph 4).

On the hearing before the 4th District Court of Appeal Appellant made the following prefatory statements in oral argument:

> "I would like to elaborate on issues raised in the court below but not treated with any degree of depth as yet in this action. This is partly due to the trial court's obvious reliance on the cases cited by Respondent herein and partly due to the Respondent's failure to take issue with these concepts and instead rely on—what I submit—are the more superficial issues raised herein.
>
> Rather, I would address myself to the basic constitutional issues—as I see them—raised in this case."

Thereafter, Appellant's *entire* oral argument was concerned with the constitutional issues and claimed violation of the 14th Amendment, U.S. Constitution provisions respecting Due Process and Equal Protection. These were again ignored by Appellee in oral argument. Incidentally, the author of the pending motion was not present at either court appearance.

The only written opinion of a California state court in this action does refer to one aspect of the constitutional challenge (Appendix A—p. 6, paragraph 2) but assumes the validity of Labor Code Section 555 without reference to its constitutionality (*Id.* p. 3, paragraph 4).

Appellant thereafter in his Petition for Hearing in the California Supreme Court (Record, No. 15) again set forth the challenges on constitutional grounds and *for the first time in this entire proceeding* the Appellee joined some of those issues in his Answer to Petition in the California Supreme Court (Record, No. 16). Nowhere in said Answer did Appellee raise the point that the constitutional issues had not theretofore been properly or timely raised in this action.

ARGUMENT.

1. Appellant Has Properly and Timely Raised the Federal Questions in the State Courts.

In a federal system it is important that state courts be given first opportunity to consider constitutional challenges to state's laws. *Crowell v. Randell,* 10 Pet. 368, 9 L. Ed. 458.

Whether or not a federal question has been properly raised in the state courts is itself a federal question and one which the United States Supreme Court is not bound by the decision of state courts. *Street v. New York,* (1969) 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572.

A state can not invoke a procedural rule to defeat an otherwise meritorious federal claim. *O'Connor v. Ohio,* (1966) 385 U.S. 92, 87 S. Ct. 252, 17 L. Ed. 2d 189.

California law requires that constitutional questions be properly raised in trial court before they can be considered on appeal. *Sacramento and San Joaquin Drainage District v. Supreme Court,* (1925) 196 Cal. 414.

As noted in the Statement hereinabove, and as reflected by the Record in this case, Appellant raised constitutional issues from the pleading stage on through the appellate levels of the State courts. Concededly said issues were—at first—very general but became more specific in the appellate levels. Furthermore, they were finally met by Appellee (without raising the rule in the *Sacramento* case, *supra*). Finally, they were, in part passed on by the only state appellate court that heard the case.

Is Appellant to be denied relief herein because Appellee refused to take issue with the federal questions raised? Can the State courts avoid further review in the federal system merely by ignoring a party's claimed constitutional challenge? Appellant submits that to do so would be to put "form" above "substance" in the law.

2. The Judgment Below Can Not by Any Reasonable Interpretation Rest Upon an Adequate Non-Federal Basis.

When considered in the context of the pleadings, Points and Authorities, Briefs and Oral Argument in the 4th District Court of Appeal, the only written opinion of a California court in this action (Appendix A) must—of necessity—be based upon laws (statutory or decisional) that have been challenged as to their constitutionality. There is no other basis for the results.

It is obvious that the Judgment of the Trial Court herein was rendered on the basis of Appellee's grounds as stated in his Demurrer (Record No. 3) which states:

> "The complaint fails to state facts sufficient to constitute a cause of action in that it does not allege the existence of a law, ordinance or resolution authorizing overtime pay or compensatory time off for an officer in plaintiff's position and classification. (C.C.P. 430 (6))"
>
> "The complaint is uncertain in that it does not apprise the defendant of the specific law, ordinance or resolution upon which plaintiff's claim is based. (C.C.P. 430 (7))"

The 4th District Court of Appeal's opinion affirming said judgment also clearly indicates that the *basis*

for the Trial Court's judgment is its interpretation that the decisional rule of law in California regarding public employees is valid, *i.e.* there must be some "written law" to provide for the claimed compensation herein. Necessarily, and logically, it follows that said court considered the restrictions in Labor Code Section 555 to be a valid restriction to only one city in California (viz. the City and County of San Francisco) and therefore inapplicable to Appellant's case.

Appellee's discussion in his Motion to Dismiss (p. 6 *et seq.*) that the California Court of Appeal considered Appellant's "professional responsibility" as a basis for the judgment is out of context. Said discussion refers to those facts as having a bearing on the applicability of the doctrine of estoppel (Appendix A —p. 6, paragraph 1).

Appellee's further discussion on this ground is *Appellee's interpretations* of the applicable Labor Code sections and not that of the 4th District Court of Appeal nor any other court in this action (Appellee's Motion to Discuss, p. 7, paragraph 2 *et seq.*).

Conclusion.

For all the foregoing reasons, and based upon the facts of this case and the grave constitutional issues raised as set forth in Appellant's Jurisdictional Statement, Appellant requests that the Motion to Dismiss be denied and that this honorable court exercise jurisdiction to hear this matter on its merits.

Respectfully submitted,

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Attorney at Law,
Attorney for Appellant.